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IN THE

Supreme Court of the United States

NATIONAL PARKS CONSERVATION ASSOCIATION, *et al.*,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA POWER COMPANY IN SUPPORT OF TENNESSEE VALLEY AUTHORITY

KARL R. MOOR
SOUTHERN COMPANY
Bin SC1201, 12th Floor
30 Ivan Allen, Jr. Blvd., NW
Atlanta, Georgia 30308
(404) 506-0853

DANIEL S. REINHARDT
MARGARET C. CAMPBELL
TROUTMAN SANDERS LLP
600 Peachtree Street
Suite 5200
Atlanta, Georgia 30308
(404) 885-3000

MICHAEL D. FREEMAN
Counsel of Record
STEVEN G. MCKINNEY
P. STEPHEN GIDIERE III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama 35203
(205) 251-8100

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF *AMICUS CURIAE* ALABAMA POWER COMPANY IN SUPPORT OF TENNESSEE VALLEY AUTHORITY

INTERESTS OF *AMICUS CURIAE*

Alabama Power Company ("Alabama Power") supplies power to more than 1.3 million homes and businesses in the southern two-thirds of Alabama.[1] Its

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Alabama Power's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

power generation and transmission system is interconnected with the Tennessee Valley Authority ("TVA") system in northern Alabama. This interconnection allows for the exchange of power between the two systems and provides economic and reliability benefits, such as the ability to respond to emergency conditions.

The specific allegations raised in this case were first made against TVA by the United States Environmental Protection Agency ("EPA") in 1999 by way of an Administrative Compliance Order ("ACO"). At that time, TVA, Alabama Power, and others filed petitions for review in the United States Court of Appeals for the Eleventh Circuit challenging the ACO. *Tenn. Valley Auth. v. Envtl. Prot. Agency*, 278 F.3d 1184, 1205-07 (11th Cir. 2002). The court of appeals held that Alabama Power had standing to challenge the ACO because of "the interconnectedness of their electric transmission networks with TVA's." *Id.* at 1206. On the merits, the court of appeals found the ACO to be "legally inconsequential" and held that TVA was "free to ignore the ACO without risking the imposition of penalties for noncompliance with its terms." *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1240 (11th Cir. 2003). When a petition for writ of certiorari was filed, Alabama Power was among the parties that urged this Court to deny the petition, which it did. *Leavitt v. Tenn. Valley Auth.*, 541 U.S. 1030 (2004). When Petitioners here filed this citizen suit parroting the allegations in EPA's earlier ACO, Alabama Power again participated to protect its interests, this time as *amicus curiae* at the court of appeals.

In addition to these interests, Alabama Power itself operates coal-fired power plants in Alabama and is a

defendant in a case pending in the United States District Court for the Northern District of Alabama involving allegations similar to those here. *United States v. Ala. Power Co.*, No. 2:01-cv-00152-VEH (N.D. Ala.). In that case (filed in 2001), EPA alleges that Alabama Power made "major modifications" to four of its facilities, the last of which allegedly commenced in 1993, outside the five-year statute of limitations at issue in this case. As here, EPA does not allege that Alabama Power is violating or has violated any of the emission limitations in its state-issued operating permits, only that Alabama Power should have sought pre-construction permits from the state of Alabama prior to starting the work in question. Thus, the same Alabama regulations at issue here are at issue in the case against Alabama Power, and the court of appeals' ruling is of significant interest to Alabama Power.

Finally, Alabama Power respectfully submits that this *amicus curiae* brief is particularly important given TVA's unique independent status and the Department of Justice's role in practice before this Court. Although TVA represented itself and presented its position in the proceedings below based on its independent litigating authority,[2] Alabama Power understands that TVA has been prevented by the Department of Justice from continuing to do so in this case and that the Solicitor General will instead file a brief in response to the petition.[3] This will likely result in some change of the position presented on behalf of TVA. While Alabama Power does not know what arguments the Department of Justice will

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[2] *See Tenn. Valley Auth.*, 278 F.3d at 1193-98.

[3] *See* 28 U.S.C. § 518(a); 28 C.F.R. § 0.20(a).

make in response to the petition, this inter-agency process will likely dilute the adversarial nature of this case, making this *amicus curiae* brief essential to sharpening the presentation of the issues to this Court.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In the appendix to their petition, Petitioners include some of the relevant provisions of the Alabama State Implementation Plan ("SIP") but fail to include others. Additional relevant provisions of the Alabama SIP are included in an appendix to this brief and are cited herein.

SUMMARY OF THE ARGUMENT

There is no "split" between the Eleventh and Sixth Circuits regarding the five-year statute of limitations in 28 U.S.C. § 2462. Those two circuits reached different results in separate cases involving TVA because of differences in the underlying state laws, not because of any disagreement on an overarching issue of federal law. Further, the Eleventh Circuit correctly applied 28 U.S.C. § 2462 to Petitioners' claims alleging violations of the Alabama SIP in connection with work TVA performed in 1982 and 1983. Petitioners' remaining arguments for review—that the court of appeals somehow erred in applying the concurrent remedy doctrine and the pre-suit notice requirement—also involve no conflict among the circuits nor any important issue of federal law. Finally, there are unresolved issues with respect to Petitioners' standing that would complicate review by this Court.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS OR IMPORTANT QUESTION OF FEDERAL LAW WARRANTING CERTIORARI

Petitioners seek review by this Court to correct what they see as a "widespread, disparate, and often erroneous application of 28 U.S.C. § 2462 in environmental enforcement cases," which they say is reflected in a "split between the Sixth and Eleventh Circuits." Pet. at 13 (capitalization omitted). This so-called "split" is based on Petitioners' comparison of the Eleventh Circuit's decision here with the earlier decision of the Sixth Circuit in *National Parks Conservation Association v. Tennessee Valley Authority*, 480 F.3d 410 (6th Cir. 2007). *Id.* These two circuits' decisions, however, interpreted and applied different ***state laws*** that led those courts to different outcomes. There simply is no split "on the same important matter" and no "important question of federal law" justifying this Court's review. Sup. Ct. R. 10(a), (c).

Indeed, the Eleventh and Sixth Circuits actually agreed on the overarching federal issue—*i.e.*, whether the five-year statute of limitations in 28 U.S.C. § 2462 applied to the alleged SIP violations before them. *Nat'l Parks Conservation Ass'n*, 480 F.3d at 416 ("We hold that § 2462's five-year statute of limitations applies."); Pet. App. at 11a ("Legal claims brought under the Clean Air Act are subject to the general federal five-year statute of limitations established by 28 U.S.C. § 2462 . . . ."). The different outcomes in the two cases were driven by differing aspects of the Alabama and Tennessee SIPs. The Sixth Circuit found that the Tennessee SIP imposed on sources "an ongoing duty to ensure that they obtain the appropriate emissions limitations in their con-

struction permits, even if they failed to do so before construction." *Nat'l Parks Conservation Ass'n*, 480 F.3d at 413 (citing Tenn. Comp. R. & Regs. § 1200-3-9-01(1)(e)). Conversely, the Eleventh Circuit found that the Alabama SIP contained no "analogous provision" and that "[u]nlike Tennessee, Alabama limited the obligation to apply Best Available Control Technology to proposed modifications, with no caveat continuing the obligation for the operating life of the source if it was not met during the construction phase." Pet. App. at 19a; *see also id.* at 17a ("A careful review of *Alabama's* preconstruction permitting program reveals that Best Available Control Technology was to be determined and installed at the time of construction.") (emphasis added). This "important difference in the states' plans," the Eleventh Circuit concluded, "ultimately precludes us from reaching the same result as our sister circuit." *Id.* at 18a-19a.[4]

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[4] Petitioners also point to different results in district court cases, some involving SIP claims and some not. Pet. 13-14. But it is well understood by district courts, and requires no clarification from this Court, that the application of 28 U.S.C. § 2462 in the context of a SIP claim requires an analysis of the underlying SIP that is alleged to have been violated. For example, after the Sixth Circuit's decision, the United States District Court for the Eastern District of Kentucky addressed the application of 28 U.S.C. § 2462 to alleged violations of the Kentucky SIP. *United States v. East Ky. Power Co-Op, Inc.*, 498 F. Supp. 2d 970 (E.D.Ky. 2007). The district court there had no difficulty applying the same well-established principles applied by the Sixth Circuit and the Eleventh Circuit to the specific provisions of the Kentucky SIP. *Id.* at 974-75. Petitioners do not cite the *East Kentucky Power* decision in their litany of district court decisions on 28 U.S.C. § 2462. Pet. at 13-14. The decision underscores the state-specific nature of the inquiry when the underlying claim is based on a SIP and the fact that

That Alabama and Tennessee take a somewhat different approach to construction permitting under their respective SIPs is entirely consistent with the cooperative federalism approach adopted by Congress in the Clean Air Act. Under the Act, Congress gave the states the primary responsibility of regulating air pollution from facilities within their borders. *See* 42 U.S.C. § 7401(a)(3) ("Air pollution prevention . . . is the primary responsibility of States and local governments."); *id.* § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State."). While EPA's job is to promulgate air quality standards for certain pollutants and to ensure that the minimum requirements for control programs are met, *id.* § 7409, the states are responsible for deciding how to achieve those standards and requirements within their own borders through EPA-approved SIPs. *Id.* § 7410(a); *Envtl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1428 (2007) ("The Clean Air Act Amendments of 1970 . . . directed EPA to devise National Ambient Air Quality Standards (NAAQS) limiting various pollutants, which the States were obliged to implement and enforce . . . ."); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 78-79 (1975). The statutory New Source Review ("NSR") program adopted by Congress in 1977 continued the basic cooperative federalism approach in the Act. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 349-51 (D.C. Cir. 1980) ("The 1977 Amendments maintain the basic structure of regulation of stationary sources through state plans."); *cf. Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461, 491 (2004) (describing the PSD program

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no further review is warranted with respect to the Eleventh Circuit's analysis of the particulars of the Alabama SIP.

as a regulatory "scheme that 'places primary responsibilities and authority with the States, backed by the Federal Government.'" (quoting S. Rep. No. 95-127, p. 29)).

In accordance with this congressional intent, Alabama and Tennessee have fulfilled their cooperative roles. Both states have adopted SIPs, which were approved by EPA.[5] Both of those SIPs meet the minimum federal requirements, but (key to this case) they are not identical. The federal courts of appeals with jurisdiction for each state have interpreted the pre-construction permitting provisions of each SIP vis-à-vis 28 U.S.C. § 2462 and have reached different results based on the differences in those SIPs. This is not a conflict; it is how Congress designed the process. If Petitioners believe that differences in the Alabama and Tennessee SIPs make one or both of the SIPs deficient, their recourse is to petition EPA for a "SIP call" requiring correction of the perceived deficiency,[6] not review by this Court exploring the intricacies of various state permitting schemes.

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[5] Both Alabama's and Tennessee's SIP were first approved by EPA on May 31, 1972. 37 Fed. Reg. 10,842, 10,847, 10,894 (May 31, 1972). The NSR provisions of the Alabama SIP were approved effective December 10, 1981, and the NSR provisions of the Tennessee SIP were approved effective March 28, 1985. 46 Fed. Reg. 55,517 (Nov. 10, 1981) (Alabama); 50 Fed. Reg. 7,777 (Feb. 26, 1985) (Tennessee).

[6] If the EPA determines that a SIP is "substantially inadequate," it may issue a "SIP call" to the offending state, requiring the state to revise its SIP to correct the inadequacies. 42 U.S.C. § 7410(k)(5).

II. THE COURT OF APPEALS CORRECTLY APPLIED THE ALABAMA SIP

The court of appeals' application of 28 U.S.C. § 2462 to Petitioners' claims under the Alabama SIP is wholly unremarkable and merits no further review. The court of appeals' starting point was the universally accepted principle that a "claim first accrues on the date that a violation first occurs." Pet. App. at 11a. The court looked to the nature of Petitioners' claim (that TVA should have sought a pre-construction permit before the 1982 and 1983 work in question) and the legal basis for it (the Alabama SIP) to determine when the claim first accrued and whether Petitioners' complaint, filed twenty years later, was timely. *Id.* at 15a-20a.

In doing so, the court of appeals correctly applied the requirements of the Alabama SIP to Petitioners' claims. Under the Alabama SIP (as well as the Clean Air Act itself), a source is obligated to seek a pre-construction permit as a "prerequisite" to starting construction. *Id.* at 17a; *see also Envtl. Def.*, 127 S. Ct. at 1429 ("The 1977 amendments required a PSD permit before a 'major emitting facility' could be 'constructed.'"); 42 U.S.C. § 7475(a) ("No major emitting facility . . . may be constructed . . . unless" certain requirements are met.). Thus, a claim for failing to obtain such a permit accrues at the time construction begins without it. Pet. App. at 18a. This is reflected in the citizen suit provision that forms the basis for Petitioners' lawsuit, which is phrased entirely in the present tense. That provision creates a claim "against any person who *proposes to construct or constructs*" without a permit, but it does not retroactively create a claim against a person who "has constructed" without the required permit at some time in the distant past. 42 U.S.C.

§ 7604(a)(3) (emphasis added); *see also* Pet. App. at 13a. Similarly, the enforcement provision of Part C of the Clean Air Act contemplates that EPA or state enforcement officers will "take such measures, including issuance of an order, or seeking injunctive relief, as necessary *to prevent* the construction or modification of a major emitting facility which does not conform to the requirements of this part." 42 U.S.C. § 7477 (emphasis added). Thus, all around, the Clean Air Act contemplates enforcement of pre-construction permitting requirements *at the time of construction*.

Petitioners do not dispute this. Instead, they argue that the obligation to seek a determination from the state as to the Best Available Control Technology ("BACT") (which is one aspect of pre-construction permitting) continues indefinitely because they say "the BACT requirement in the SIP stands on its own" and thus "each day TVA operates [] without BACT emission limits is a new violation . . . ." Pet. at 24. As support, Petitioners cite to Alabama Administrative Code subsections 335-3-14-.01(1)(a) and (c), which they say "explicitly state[]" "the prohibition against operation without an NSR permit." Pet. at 19-20. This argument is flawed because it contradicts the plain language of the Alabama SIP (both at the time of TVA's work and now).

First, Petitioners mischaracterize the meaning and import of Alabama Administrative Code subsections 335-3-14-.01(1)(a) and (c). These subsections are not—either explicitly or implicitly—a "prohibition against operation without an NSR permit," as Petitioners assert. Pet. at 19. Subsections (a) and (c) of rule 335-3-14-.01(1), quite plainly, prohibit operation of certain pollutant-emitting equipment without an "Air Permit." An "Air Permit" under the Alabama SIP is not "an

NSR permit." An "Air Permit" is the generic permit that a source must have to operate pollutant-emitting equipment in Alabama, and such a permit may or may not include NSR-related requirements. *See* Ala. Admin. Code r. 335-3-14-.01(1)(a). NSR requirements are addressed in a different section of the Alabama SIP. *See* Ala. Admin. Code r. 335-3-14-.04(1)(b) ("No new major stationary source or major modification to which the requirements of paragraphs (9) through (17)(c) of this rule apply shall begin construction without a permit that states that the major stationary source or major modification will meet those requirements."). In the present case, Petitioners did not accuse TVA of operating without an Air Permit; in fact, it is undisputed that TVA did have an Air Permit. Pet. App. at 20a-21a. Instead, as the court of appeals rightly recognized, Petitioners accused TVA of having "the wrong" Air Permit, which is a collateral attack well past its time. Pet. App. at 21a (citing *United States v. AM Gen. Corp.*, 34 F.3d 472, 475 (7th Cir. 1994)).

Second, an analysis of the actual NSR provisions of the Alabama SIP shows that BACT is by definition not an independent, ongoing requirement.[7] BACT for a

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[7] Beyond the Alabama SIP, Petitioners strain to make the Clean Air Act impose some kind of ongoing obligation to seek a BACT determination that would give rise to "new" and "continuous" violations every day the plant is operated. The plain terms of the statute do not support this. As explained above, the Clean Air Act requires a pre-construction determination of BACT for a specific construction or modification project. *See* 42 U.S.C. § 7475(a). BACT is therefore wholly tied to a particular construction or modification project and does not arise in any other context. Petitioners point to the phrase "as a condition of operations" in 42 U.S.C. § 7604(f)(4) to try to cobble together an argument that BACT is an independent emission limitation that can serve as the basis for a citizen suit decades after the original construction or modification. Pet. at 17-18. Petitioners' inter-

source does not exist until it is determined by the Director "on a case-by-case basis" for a particular project *before* construction begins. Ala. Air Pollution Control Comm'n Reg. 16.4.2(l) (emphasis added) (presently codified at Ala. Admin. Code r. 335-3-14-.04(2)(l)); *see also* Ala. Air Pollution Control Comm'n Reg. 16.4.8(a) (presently codified as Ala. Admin. Code r. 335-3-14-.04(8)(a)) (providing that "[n]o major stationary source or major modification shall begin actual construction unless" BACT is determined). BACT is determined for "each *proposed* emissions unit" where a net emissions increase "*would* occur." Ala. Air Pollution Control Comm'n Reg. 16.4.9(c) (emphasis added) (presently codified at Ala. Admin. Code r. 335-3-14-.04(9)(c)). Moreover, the inputs to the BACT process are based on a snapshot assessment for a particular construction project taken before the project begins. For example, establishing BACT requires a "[p]reapplication . . . analysis of ambient air quality in the area" that includes "continuous air quality monitoring data . . . gathered over a period of at least one (1) year . . . represent[ing] the year *preceding* receipt of the application." Ala. Air Pollution Control Comm'n Reg. 16.4.12(a) (emphasis added) (presently codified at

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pretation wrenches the statutory language out of context. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The phrase "as a condition of operations" does not even refer to NSR permits (which are mentioned expressly in the preceding subsection). Moreover, the purpose of § 7604 is to delineate the scope of citizen suit jurisdiction in general, not to define BACT as anything other than a pre-construction requirement. Section 7604 certainly is not designed to extend a source's obligation to seek a determination of BACT decades after a construction or modification project has begun.

Ala. Admin. Code r. 335-3-14-.04(12)(a)). Based on this analysis and other contemporaneous data, the Director determines the appropriate degree of emission reduction that is achievable "through application of production processes or available methods." Ala. Air Pollution Control Comm'n Reg. 16.4.2(l) (presently codified at Ala. Admin. Code r. 335-3-14-.04(2)(l)).

Thus, given the indisputable *pre*-construction nature of the BACT analysis and the contemporaneous information that is necessary to determine it in a given case, it is particularly appropriate to apply the five-year statute of limitations to BACT-related claims. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (internal quotations omitted). As this Court has observed in the BACT context, "EPA itself regards it as 'imperative' to act on a timely basis, recognizing that courts are 'less likely to require new sources to accept more stringent permit conditions the farther planning and construction have commenced.'" *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 495.

That logic applies here with full force. It is undisputed that TVA had a valid permit to operate its Colbert Plant. Pet. App. 3a, 7a; Doc. 171, Ex. 14-16.[8] It is further undisputed that TVA's 1982 and 1983 work was the subject of media scrutiny and public notices and that TVA provided Petitioner Sierra Club with

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[8] "Doc." citations are to the documents in the district court record.

actual notice of its intentions. Doc. 101, Ex. 10, 11, 14-17, 21, 22. Had Petitioners perceived some violation or shortcoming, they had five years to complain. They did not. The court of appeals rightly held that their complaint—filed twenty years later—was time-barred by 28 U.S.C. § 2462.

III. THE COURT OF APPEALS' APPLICATION OF THE CONCURRENT REMEDY DOCTRINE AND THE PRE-SUIT NOTICE REQUIREMENT DOES NOT WARRANT FURTHER REVIEW

Petitioners' remaining arguments for review are unavailing. First, Petitioners distort the decision below when they say the court of appeals "rul[ed] that section 2462 bars petitioners' claims for injunctive relief." Pet. at 25. The court of appeals did no such thing. While it is true that 28 U.S.C. § 2462 can bar certain forms of non-monetary relief,[9] that was not the court of appeals' holding here. The court expressly held: "By its plain language, the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies." Pet. App. at 22a.

Petitioners' real gripe is not with the "Eleventh Circuit's judge-made expansion of Section 2462," Pet. at 26, but with the court's application of the concurrent remedy doctrine to their claims. And while Petitioners

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[9] *See Coghlan v. Nat'l Transp. Bd.*, 470 F.3d 1300, 1305 (11th Cir. 2006) (holding that "a 'penalty,' as the term is used in § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action.") (quoting *Johnson v. Sec. & Exch. Comm'n*, 87 F.3d 484, 488 (D.C. Cir. 1996)).

complain that the court of appeals' "ruling barring their claims for injunctive relief . . . contravenes the decisions of this Court," Pet. at 25 (capitalization omitted), they fail to point out, much less discuss, any such "decisions." The truth is the court of appeals contravened no decision of this Court. Rather, it followed and applied the Court's decision in *Cope v. Anderson*, 331 U.S. 461 (1947), to the facts before it. This is something that has been done by other circuits, too, and is no basis for further review. *See, e.g., Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997) (holding that federal government's claims for injunctive relief were barred because, per *Cope*, "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy").

Second, Petitioners' argument that the court of appeals erred in affirming the dismissal of their New Source Performance Standards ("NSPS") claims for failure to provide adequate pre-suit notice is a flimsy basis for this Court's review. Petitioners point to no decision of this Court or any other court that contradicts the court of appeals' decision on this point. The decision to affirm was based entirely on the particulars of Petitioners' shotgun notice letter to TVA, not on any point of law. Pet. App. at 29a-30a. Further review of this holding is not appropriate or warranted.

IV. PETITIONERS HAVE A STANDING PROBLEM

Petitioners say that "the district court granted Petitioners' motion for partial summary judgment on standing, and TVA did not appeal that ruling." Pet. at 10. That is not entirely true. In point of fact, the district court only granted *in part* Petitioners' motion

for partial summary judgment on standing and *only* with respect to "visibility impairment / opacity."[10] Doc. 202 at 9. The district court *denied* Petitioners' motion on standing "as to other emissions." *Id.*[11]

This is an important distinction that impacts the ultimate justiciability of this case. As the court of appeals noted, Petitioner Sierra Club filed a "*separate* suit alleg[ing] that TVA's operations at the Colbert Plant repeatedly violated the 20% opacity limitation . . . during the five-year period from 1997 to 2002." Pet. App. at 6a (emphasis added). The district court considered consolidating that separate opacity suit with the present case, but decided against it. Pet. App. at 9a. Thus, while Petitioners' may have established their standing for that separate opacity suit, their standing "as to other emissions" has not been established.

Further, the district court expressed concern about whether Petitioners would ultimately be able to prove standing based on alleged health effects to their members or damage to their property. Doc. 202 at 7. The district court cautioned Petitioners that it "would expect, after appropriate investigation, the dismissal of claims

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[10] "The term 'opacity' refers to the extent to which a plume of smoke 'reduce[s] the transmission of light and obscure[s] the view of the background.'" *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1341 (11th Cir. 2005) (quoting Ala. Admin. Code r. 335-3-1-.02(1)(tt)). Opacity is not itself a pollutant; it is a condition. *Id.*

[11] Petitioners are also incorrect to suggest that TVA concedes their standing. In its briefing at the court of appeals, TVA argued that Petitioners lack standing to pursue their NSPS claims related to sulfur dioxide. Principal Br. of TVA, No. 06-10729, at 57 (11th Cir. June 19, 2006). In any case, standing is jurisdictional. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

or parties whose legal theories or purported facts are not supported." *Id.* Additional questions were raised by the district court about Petitioners' "ability to prove causation regarding Colbert Unit 5" and whether they will be able to "link causation between the 1982 work at Colbert 5 and the claimed injuries." *Id.* at 9. *See Lujan*, 504 U.S. at 560 (holding that a "causal connection between the injury and the conduct complained of" is an "irreducible constitutional minimum"). Petitioners submitted no further relevant evidence supporting their standing after these questions were raised. Thus, there is doubt about whether Petitioners have demonstrated their standing with the necessary level of proof for this stage of the litigation and whether they could carry their ultimate burden of proof at trial. *See id.* at 561 ("[Standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KARL R. MOOR
SOUTHERN COMPANY
Bin SC1201, 12th Floor
30 Ivan Allen, Jr. Blvd., NW
Atlanta, Georgia 30308
(404) 506-0853

DANIEL S. REINHARDT
MARGARET C. CAMPBELL
TROUTMAN SANDERS LLP
600 Peachtree Street
Suite 5200
Atlanta, Georgia 30308
(404) 885-3000

Counsel for Amicus Curiae

MICHAEL D. FREEMAN
Counsel of Record
STEVEN G. MCKINNEY
P. STEPHEN GIDIERE III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama 35203
(205) 251-8100

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APPENDIX

APPENDIX

Alabama State Implementation Plan

Alabama Air Pollution Control Commission Reg. 16.4.2(l)

Definitions.

For the purposes of this Part only, the following terms will have meanings ascribed in this Section:

* * * * *

(l) "Best Available Control Technology ("BACT")" shall mean an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the CAA which would be emitted from any proposed major stationary source or major modification which the Director, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of BACT result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR 60 and 61. If the Director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof may be pre-

scribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results.

Alabama Air Pollution Control Commission Reg. 16.4.8(a)

Review of Major Stationary Sources and Major Modifications – Source Applicability and Exemptions.

(a) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in Sections 16.4.9 through 16.4.17 of this Part have been met.

Alabama Air Pollution Control Commission Reg. 16.4.9(c)

Control Technology Review.

* * * * *

(c) A major modification shall apply BACT for each pollutant subject to regulation under the CAA for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

Alabama Air Pollution Control Commission Reg. 16.4.12(a)

Air Quality Analysis.

(a) Preapplication Analysis.

(1) Any application for a permit under this Part shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(i) For the source, each pollutant that it would have the potential to emit in a significant amount;

(ii) For the modification, each pollutant for which it would result in a significant net emissions increase.

(2) With respect to any such pollutant for which no NAAQS exists, the analysis shall contain such air quality monitoring data as the Director determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(3) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(4) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one (1) year and shall represent the year preceding receipt of the application, except that, if the Director deter-

mines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one (1) year (but not to be less than four (4) months), the data that is required shall have been gathered over at least that shorter period.

(5) For any application which becomes complete, except as to the requirements of Subparagraphs (a)(3) and (4) of this Section, between June 8, 1981, and February 9, 1982, the data that Subparagraph (a)(3) of this Section requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

(i) If the source or modification would have been major for that pollutant under 40 CFR 52.21 as in effect on June 19, 1978, any monitoring data shall have been gathered over at least the period required by those regulations.

(ii) If the monitoring data would relate exclusively to ozone and would not have been required under Federal PSD regulations as in effect on June 19, 1978, the Director may waive the otherwise applicable requirements of Subparagraph (a)(5) of this Section to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(6) The owner or operator of a proposed stationary source or modification of VOC who satisfies all conditions of Section 16.3.2 may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under Paragraph (a) of this Section.

Ala. Admin. Code Rule 335-3-14-.04(2)(l) (current)

(2) Definitions.

For the purposes of this rule only, the following terms will have meanings ascribed in this paragraph:

* * * * *

(l) "Best Available Control Technology (BACT)" shall mean an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the Director, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of BACT result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR 60 and 61. If the Director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth

the emissions reduction achievable by implementation of such design, equipment, work practice, or operation and shall provide for compliance by means which achieve equivalent results.

Ala. Admin. Code Rule 335-3-14-.04(8)(a) (current)

(8) Review of Major Stationary Sources and Major Modifications – Source Applicability and Exemptions.

(a) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in paragraphs (9) through (17) of this rule have been met.

Ala. Admin. Code Rule 335-3-14-.04(12)(a) (current)

(12) Air Quality Analysis.

(a) Preapplication Analysis.

1. Any application for a permit under this rule shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(i) For the source, each pollutant that it would have the potential to emit in a significant amount;

(ii) For the modification, each pollutant for which it would result in a significant net emissions increase.

2. With respect to any such pollutant for which no NAAQS exists, the analysis shall contain such air quality monitoring data as the Director determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

3. With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

4. In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one (1) year

and shall represent the year preceding receipt of the application, except that, if the Director determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one (1) year (but not to be less than four (4) months), the data that is required shall have been gathered over at least that shorter period.

5. Reserved.

6. The owner or operator of a proposed stationary source or modification of VOC who satisfies all conditions of rule 335-3-14-.05 may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as required under subparagraph (a) of this paragraph.

7. For any application that becomes complete, except as the requirements of subparagraphs (a)3. and 4. of this paragraph pertaining to PM10, after December 1, 1988 and no later than August 1, 1989 the data that subparagraph (a)3. of this paragraph requires shall have been gathered over at least the period from August 1, 1988 to the date the application becomes otherwise complete, except that if the Director determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than 4 months), the data that subparagraph (a)3. of this paragraph requires shall have been gathered over that shorter period.

8. With respect to any requirements for air quality monitoring of PM10 under subparagraphs (8) (k) and (l) of this rule, the owner or operator of the source or modification shall use

a monitoring method approved by the Director and shall estimate the ambient concentrations of PM10 using the data collected by such approved monitoring method in accordance with estimating procedures approved by the Director.